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ISKANDAR COAST SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
ZALEHA YUSOF JCA
B RHODZARIAH BUJANG JCA
[CIVIL APPEAL NO: W-01(A)-392-11-2017]
13 JUNE 2019

C ***CIVIL PROCEDURE:*** *Judicial review – Application for – Judicial review against decision of Director-General of Inland Revenue ('DGIR') – Lands compulsorily acquired and company received compensation – Gains arising from compensation not reported – DGIR sent notices of assessment with penalty – Applicant aggrieved by DGIR's notices of assessment and filed for judicial review – Whether applicant exhausted all available domestic avenues before applying for judicial review –* D *Whether there were exceptional circumstances to allow applicant's application – Rules of Court 2012, O. 53 – Income Tax Act 1967, s. 24(1)(a)*

REVENUE LAW: *Income tax – Assessment – Lands compulsorily acquired and company received compensation – Gains arising from compensation not reported – Director-General of Inland Revenue ('DGIR') sent notices of assessment with penalty* E *– Whether gains arising from compensation taxable – Whether company had prior knowledge of intended acquisition – Whether DGIR acted lawfully and within jurisdiction in issuing notices of assessment – Income Tax Act 1967, s. 24(1)(a)*

In 2007, the appellant's shareholders injected parcels of land as part of its capital contribution and of the lands that were injected, seven parcels were F compulsorily acquired by the State Government of Johor. The appellant received RM85,970,820 in compensation. In 2015, the respondent discovered that the appellant omitted to report the gains arising from the said compensation ('the gains'). The respondent then informed the appellant that the gains would be brought to income tax pursuant to s. 24(1)(a) of the G Income Tax Act 1967 ('ITA') for the years of assessment of 2008 and 2009. The appellant argued that the gains were not subject to income tax and the primary dispute in the present matter, namely, the applicability of s. 24(1)(a) of the ITA, was purely a question of law. The respondent replied, informing the appellant that s. 24(1)(a) of the ITA applied and maintained the decision H that the gains were subject to income tax. The respondent then issued notices of assessment for the years of 2008, 2009 and 2013 ('the notices of assessment'), with penalty. This prompted the appellant to file for a judicial review application, at the High Court, to quash the decision of the respondent in issuing the notices of assessment. Dismissing the appellant's application, I the High Court Judge ('HCJ') held that (i) the dispute should be dealt with by the Special Commissioner of Income Tax ('SCIT'), like any other appeal on assessment, and not by way of judicial review; and (ii) there were no

exceptional circumstances to allow the appellant's application, by way of judicial review, instead of going through the domestic appeal process. Hence, the present appeal. A

Held (dismissing appeal)
Per Abdul Rahman Sebli JCA delivering the judgment of the court: B

(1) The procedure where the taxpayer is aggrieved by the assessment made the Director-General of Inland Revenue is prescribed under s. 99 of the ITA, which is to appeal to the SCIT. The availability of a domestic appeal procedure did not mean that the appellant could have no recourse to judicial review. That option is always available and there is no requirement for the appellant to exhaust the remedy under s. 99 of the ITA before resorting to O. 53 of the Rules of Court 2012. However, there is a caveat before the judicial review jurisdiction could be exercised by the court and that is the requirement to show 'very exceptional circumstances'. Exceptional means 'unusual; not typical'. 'Very exceptional circumstances' means very unusual circumstances. (paras 5-7 & 17) C D

(2) In *Government of Malaysia & Anor v Jagdish Singh*, the Supreme Court held that, where there is an appeal provision available, *certiorari* should not normally issue unless (i) there is a clear lack of jurisdiction; (ii) a blatant failure to perform some statutory duty; or (iii) in appropriate cases, there is a serious breach of the principles of natural justice. Taking this case as the guiding principle, the position of the appellant *vis-a-vis* the respondent was clear – since there was another avenue open to the appellant to ventilate its dissatisfaction over the decision of the respondent, the court would only exercise its judicial review jurisdiction in very exceptional cases. (paras 7, 8 & 16) E F

(3) What amounts to very unusual circumstances must depend on the factual matrix of each case. The HCJ had not fallen into error. There was nothing exceptional about the appellant's case to entitle it to bypass the domestic appeal process prescribed by s. 99 of the ITA. Nor were there 'very exceptional circumstances'. (paras 17 & 21-22) G

(4) Since appellant had prior knowledge of the intended acquisition, the income that it derived from the compulsory acquisition of the lands was deemed to be gross income under s. 24(1)(a) of the ITA and was, therefore, taxable. The respondent had not acted unlawfully and without jurisdiction in issuing the notices of assessment. (paras 43 & 46) H

***Bahasa Malaysia** Headnotes*

Pada 2007, pemegang-pemegang saham perayu menambah tujuh bidang tanah sebagai sumbangan modal dan daripada tanah-tanah ini, tujuh bidang diambil secara wajib oleh Kerajaan Negeri Johor. Perayu menerima pampasan sebanyak RM85,970,820. Pada 2015, responden menyedari perayu tidak melaporkan laba susulan pampasan tersebut ('laba'). Responden seterusnya I

memaklumkan perayu bahawa laba tersebut akan dikenakan cukai pendapatan bawah s. 24(1)(a) Akta Cukai Pendapatan 1967 ('ACP') untuk taksiran tahun 2008 dan 2009. Perayu membidas bahawa laba ini tidak tertakluk pada cukai pendapatan dan pertikaian utama dalam hal perkara ini, khususnya, pemakaian s. 24(1)(a) ACP, sepenuhnya satu soalan undang-undang. Responden membalas, memaklumkan perayu s. 24(1)(a) terpakai dan bertegas dengan keputusan laba tertakluk pada cukai pendapatan. Berikutan itu, responden mengeluarkan notis taksiran untuk tahun 2008, 2009 dan 2013 ('notis-notis taksiran'), serta denda. Ini mendorong perayu memfailkan permohonan semakan kehakiman, di Mahkamah Tinggi, untuk membatalkan keputusan responden mengeluarkan notis-notis taksiran tersebut. Menolak permohonan perayu, Hakim Mahkamah Tinggi memutuskan (i) pertikaian ini sepatutnya diselesaikan oleh Pesuruhjaya Khas Cukai Pendapatan ('PKCP'), seperti lain-lain rayuan terhadap taksiran, dan bukan melalui semakan kehakiman; dan (ii) tiada apa-apa hal keadaan luar biasa untuk membenarkan permohonan perayu, melalui semakan kehakiman, dan bukan melalui proses rayuan dalaman. Maka timbul rayuan ini.

Diputuskan (menolak rayuan)

Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Tatacara apabila seorang pembayar cukai terkilan dengan taksiran yang dibuat oleh Ketua Pengarah Hasil Dalam Negeri diperuntukkan bawah s. 99 ACP, iaitu dengan merayu pada PKCP. Kewujudan tatacara rayuan dalaman tidak bermaksud perayu tidak mempunyai jalan terakhir melalui semakan kehakiman. Pilihan ini sentiasa ada dan perayu tidak perlu mengguna habis s. 99 ACP sebelum mengguna pakai A. 53 Kaedah-kaedah Mahkamah 2012. Walau bagaimanapun, terdapat kaveat sebelum bidang kuasa semakan kehakiman boleh dijalankan oleh mahkamah iaitu keperluan menunjukkan 'hal-hal keadaan yang sangat luar biasa'. Luar biasa bermaksud 'unik; tidak biasa'. 'Hal-hal keadaan yang sangat luar biasa' bermaksud hal-hal keadaan yang sangat tidak biasa.

(2) Dalam *Government of Malaysia & Anor v. Jagdish Singh*, Mahkamah Agung memutuskan, apabila terdapat peruntukan rayuan, *certiorari* biasanya tidak diperintahkan kecuali (i) jelas tiada bidang kuasa; (ii) kegagalan nyata dalam menjalankan tanggungjawab statutori; atau (iii) dalam kes-kes sesuai, terdapat pencabulan serius prinsip-prinsip keadilan asasi. Mengguna pakai kes ini sebagai prinsip panduan, kedudukan perayu dalam hubungannya dengan responden jelas – oleh kerana terdapat jalan terbuka buat perayu menyuarakan rungutannya tentang keputusan responden, mahkamah hanya akan menjalankan bidang kuasa semakan kehakimannya dalam kes-kes yang sangat luar biasa.

(3) Apa-apa yang terangkum sebagai hal-hal keadaan yang sangat luar biasa mesti bergantung pada rentetan fakta setiap kes. Hakim Mahkamah Tinggi tidak terkhilaf. Tiada apa-apa yang luar biasa tentang kes perayu yang melayakkannya memintas proses rayuan dalaman yang diperuntukkan oleh s. 99 ACP. Tiada juga 'hal-hal keadaan yang sangat luar biasa'.

(4) Oleh kerana perayu terlebih dahulu mempunyai pengetahuan tentang pengambilan alih yang diniatkan, pendapatan yang dijana daripada pengambilan wajib tanah-tanah tersebut dianggap pendapatan kasar bawah s. 24(1)(a) ACP dan, oleh itu, boleh dikenakan cukai. Responden tidak bertindak secara tidak sah dan tanpa bidang kuasa dalam mengeluarkan notis-notis taksiran tersebut.

Case(s) referred to:

Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 1 KB 64 ***(refd)***

F Housing Sdn Bhd v. Director-General of Inland Revenue [1976] 1 LNS 27 HC ***(refd)***

Government of Malaysia & Anor v. Jagdish Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(foll)***

Harbanslal Sahnia v. Indian Oil Corporation Ltd AIR 2003 SC 2120 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Penang Realty Sdn Bhd & Another Appeal [2006] 2 CLJ 835 CA ***(refd)***

Khoo Ah Imm & Ors v. Datuk Bandar Kuala Lumpur & Anor [1997] 3 CLJ 519 CA ***(refd)***

Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 541 SC ***(dist)***

Metacorp Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2011] 1 LNS 1002 HC ***(refd)***

National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***

Preston v. IRC [1985] 2 All ER 327 ***(refd)***

Regina v. Chief Constable of The Merseyside Police, Ex Parte Calveley & Others [1986] 1 QB 424 ***(refd)***

Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 9 CLJ 505 FC ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2008] 6 CLJ 235 CA ***(refd)***

Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 4(a), 24(1)(a), 99

Rules of Court 2012, O. 53

For the appellant - DP Naban, S Saravana Kumar & Janice Tan Ying; M/s Lee Hishammuddin Allen & Gledhill.

For the respondent - Ahmad Isyak Mohd Hassan, Zaleha Adam & Ruzaidah Yaacob; SRC

[Editor's note: For the High Court judgment, please see Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2017] 1 LNS 1722 (affirmed).]

Reported by Najib Tamby

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JUDGMENT

Abdul Rahman Sebli JCA:

[1] This appeal by the appellant was against the decision of the High Court dismissing its judicial review application to quash the decision of the respondent in issuing the notices of assessment dated 8 August 2016 for the years of assessment 2008, 2009 and 2013.

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[2] Having granted leave to the appellant to file for judicial review, the learned judge at the conclusion of the *inter partes* hearing decided that the dispute raised by the appellant should be dealt with by the Special Commissioners of Income Tax, like any other appeal on assessment, and not by way of judicial review. He found no exceptional circumstances to allow the appellant's application by way of judicial review instead of going through the domestic appeal process.

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[3] After hearing arguments by both sides, we dismissed the appellant's appeal by a unanimous decision and these are our grounds. The facts leading to this appeal are as follows:

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(a) The appellant was incorporated on 10 October 2006 under the name and style of Kota Selat Tebrau Sdn Bhd. It changed its name to Iskandar Waterfront Development Sdn Bhd on 19 November 2008. Then on 3 May 2010, the appellant changed its name to Iskandar Coast Sdn Bhd until now;

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(b) In 2007, the appellant's shareholders injected parcels of land as part of its capital contribution amounting to approximately 3,962 acres.

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(c) Of the lands that were injected by the shareholders, seven parcels measuring approximately 81 acres were compulsorily acquired in 2008 and 2009 by the State Government of Johor for the purpose of constructing the coastal highway;

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(d) Consequent to the compulsory acquisition of the lands, the appellant received compensation amounting to RM85,970,820 in total;

(e) *Vide* a letter dated 24 February 2015, the respondent requested the appellant's tax agent, Messrs Pricewaterhouse Coopers Taxation Services Sdn Bhd to provide the respondent with copies of the tax computation for the years of assessment 2011 to 2013;

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(f) On 26 February 2015, the appellant's tax agent enclosed copies of the tax computation for the years of assessment 2011 to 2013 in a letter dated 26 February 2015 addressed to the respondent;

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(g) From a review and inspection of the documents provided by the appellant, the respondent found out that the appellant had omitted to report the gain from the compensation received from the compulsory acquisition of the lands.

(h) *Vide* a letter of findings dated 20 April 2015, the respondent informed the appellant that the gains arising from the compensation for the compulsorily acquired lands would be brought to income tax pursuant to s. 24(1)(a) of the Income Tax Act 1967 ("the ITA") for the years of assessment 2008 and 2009;

(i) *Vide* letters dated 29 April 2015 and 19 May 2015, the appellant through its tax agent requested for an extension of time from the respondent to revert on the issues contained in the letters of findings;

(j) *Vide* letters dated 26 May 2015, 31 March 2016 and 4 July 2017, the appellant through its tax agent responded to the respondent that the gains arising from the compensation for the compulsorily acquired lands were not subject to income tax and referred to the Supreme Court case of *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 541, and the High Court cases of *Ketua Pengarah Hasil Dalam Negeri v. Penang Realty Sdn Bhd & Another Appeal* [2006] 2 CLJ 835 and *Metacorp Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2011] 1 LNS 1002; [2011] MSTC 30-024. The appellant emphasised that the primary dispute in the present matter, ie, the applicability of s. 24(1)(a) of the ITA was purely a question of law;

(k) *Vide* letters dated 4 February 2016 and 30 June 2016, the respondent informed the appellant that he was still of the opinion that s. 24(1) of the ITA and the case of *F Housing Sdn Bhd v. Director-General of Inland Revenue* [1976] 1 LNS 27; [1976] 2 MLJ 183 applied. The respondent also maintained his decision that the gains arising from the compensation for the compulsorily acquired lands were subject to income tax;

(l) The respondent then issued the impugned notices of assessment with penalty.

[4] The issue for our determination was whether the learned High Court Judge had exercised his discretion correctly in dismissing the appellant's judicial review application on the ground that there were no exceptional circumstances to allow the appellant to proceed by way of judicial review.

[5] The procedure where the taxpayer is aggrieved by the assessment made by the Director General of Inland Revenue is prescribed by statute, ie, by s. 99 of the ITA, which is to appeal to the Special Commissioners of Income Tax. The provision reads as follows:

> 99(1) A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving the Director General within thirty days after service of the notice of assessment or, in the case of an appeal against an assessment made under section 92, within the first three months of the year of assessment following the year of assessment for which the assessment was made (or within such extended period as regards those days or months as may be

A allowed under section 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form.

[6] As a starting point, we accept the appellant's argument that the availability of a domestic appeal procedure does not mean that the appellant B could have no recourse to judicial review. That option is always available and there is no requirement for the appellant to exhaust the remedy under s. 99 of the ITA before resorting to O. 53 of the Rules of Court 2012.

[7] There is however one important caveat before the judicial review jurisdiction could be exercised by the court, and that is the requirement to C show "very exceptional circumstances". In the Supreme Court case of *Government of Malaysia & Anor v. Jagdish Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; [1987] 2 MLJ 185, Hashim Yeop A Sani SCJ (as he then was) delivering the judgment of the court held as follows at p. 189:

D A clear principle is reiterated here ie, it is not a rigid rule that whenever there is an appeal procedure available to the applicant, he should be denied judicial review. Judicial review is always at the discretion of the court *but where there is another avenue or remedy open to the applicant, it will only be exercised in very exceptional circumstances.*

In Re Preston was a tax case. It was quite clear from the speeches of their E Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that *the remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.* (emphasis added)

[8] The Supreme Court then went on to answer the question posed for its F determination by holding that where there is an appeal provision available, *certiorari* should not normally issue unless:

(1) there is shown a clear lack of jurisdiction; or

(2) a blatant failure to perform some statutory duty; or

G (3) in appropriate cases a serious breach of the principles of natural justice.

[9] The House of Lords decision in *Preston v. IRC* [1985] 2 All ER 327; [1985] AC 835 cited by the Supreme Court is particularly relevant where at p. 862 Lord Templeman said:

H Judicial review process should not be allowed to supplant the normal statutory appeal procedure [but] the present circumstances are exceptional in that the appeal procedure provided by s. 462 cannot begin to operate if the conduct of the commissioners in initiating proceedings under s. 460 [which relates to the cancellation of tax advantages] was unlawful.

I **[10]** Obviously the reason why the House of Lords considered the case to be exceptional was because the appeal procedure could not begin to operate due to the unlawfulness of the commissioners' conduct.

[11] In the present appeal, the appellant was not faced with such impediment. Going by this authority, the appellant must show that the respondent was guilty of unlawful conduct in issuing the notices of assessment to entitle it to proceed by way of judicial review instead of the domestic appeal process.

[12] In *Khoo Ah Imm & Ors v. Datuk Bandar Kuala Lumpur & Anor* [1997] 3 CLJ 519 Gopal Sri Ram JCA (as he then was) relying on *Jagdish Singh (supra)* said at p. 525:

> One of the grounds on which the remedy of certiorari may be withheld is where the applicant is able to obtain better or at least equally efficacious relief either in other proceedings or at an alternative forum. Sometimes the alternative remedy is given by statute. See, *Government of Malaysia & Anor v. Jagdish Singh* [1987] CLJ Rep 110; [1987] 1 CLJ 415.

[13] There are two other cases that were decided along the same line: See *Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 9 CLJ 505 FC and *Regina v. Chief Constable of The Merseyside Police, Ex Parte Calveley & Others* [1986] 1 QB 424. In the latter decision, it was held by the English Court of Appeal that:

> ... the judicial review jurisdiction would not normally be exercised where there was an alternative remedy by way of appeal, save in exceptional circumstances; that the speed of the alternative procedure, whether it was as convenient and whether the matter depended on some particular or technical knowledge available to the appellate body were all factors to be taken into account in considering the circumstances were exceptional.

[14] Learned counsel for the appellant referred to the Indian Supreme Court case of *Harbanslal Sahnia v. Indian Oil Corporation Ltd* AIR 2003 SC 2120 where RC Lahoti J delivering the judgment of the court said:

> So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies; (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged. (See *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Others* [1998] 8 SCC 11).

[15] What we can gather from this Indian authority is that the position in India is no different from the position in Malaysia in that the exercise of the court's 'writ jurisdiction' in India is only available "in an appropriate case", as illustrated by the three examples of contingency given by the court.

[16] Taking *Jagdish Singh* as the guiding principle, the position of the appellant *vis-à-vis* the respondent is clear – since there is another avenue open to the appellant to ventilate its dissatisfaction over the decision of the respondent in issuing the impugned notices of assessment, the court would only exercise its judicial review jurisdiction in very exceptional circumstances.

[17] Exceptional means "unusual; not typical": see *Concise Oxford English Dictionary,* 11th edn. Very exceptional circumstances therefore means very unusual circumstances. What amounts to very unusual circumstances must depend on the factual matrix of each case.

[18] As for the exercise of discretion, it is axiomatic that the power must be exercised judiciously and not capriciously, least of all wantonly. Judiciously means done with sensible judgment and not on an unaccountable mood swing.

[19] As to the proper approach to be taken by the appellate court in deciding whether to allow or to dismiss an appeal against the exercise of discretion by the lower court, we need only refer to the Federal Court case of *Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101; [1981] 2 MLJ 150 where Abdoolcader J (as he then was) delivering the judgment of the court said at pp. 103-104 (CLJ); p. 151 (MLJ):

> (b) Review of discretion by an appellate court
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> There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere "measuring cast" or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co v. Johnston* [1942] AC 130, 148 (at page 148) per Lord Wright). The Privy Council in *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 1 MLJ 228 that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v. Bartlam* [1937] AC 473.
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> The House of Lords, approving the decision of the English Court of Appeal in *Ward v James* [1966] 1 QB 273, held to the same effect in *Birkett v. James* [1978] AC 297, 317, 326 (at pp. 317, 326). For good measure, we would refer to the felicitous expression of Goulding J in *Re Reed (a debtor)* [1979] 2 All ER 22, 25 on this point (at p. 25):
>
> > … the duties of an appellate court in such matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar

> material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.

[20] The question therefore is whether the learned judge had exercised his discretion on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice when he decided to dismiss the appellant's application for judicial review.

[21] Having given the matter careful consideration, we were not persuaded that the learned judge had fallen into such error. On the contrary, we were of the view that on the evidence before him, the learned judge was perfectly entitled to come to the conclusion that the appellant had not shown exceptional circumstances.

[22] There is nothing exceptional about the appellant's case to entitle it to by-pass the domestic appeal process prescribed by s. 99 of the ITA. Nor could we find "very exceptional circumstances", in the sense that there was a clear lack of jurisdiction, or a blatant failure to perform some statutory duty, or a serious breach of the principles of natural justice that the respondent can be said to be guilty of when he issued the notices of assessment.

[23] The dispute was over the decision of the respondent to issue the notices of assessment for the years of assessment 2008, 2009 and 2013, for which the appellant's remedy lies in appealing to the Special Commissioners in accordance with s. 99 of the ITA. That would be the proper avenue for the appellant to challenge the decision of the respondent: *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563.

[24] This court's decision in *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2008] 6 CLJ 235 is also relevant where it was held that any question pertaining to the merits of the assessment made by the Director General of Inland Revenue is a matter that is better reserved for the Special Commissioners or a matter to be transmitted to the High Court by way of case stated. At para. [6] of the judgment this is what the court said:

> [6] Before the Special Commissioners a taxpayer, in this case the appellant, will have all the opportunity to ventilate his disgruntlement, with every opportunity to tender exhibits, and give oral evidence if necessary (*Director-General of Inland Revenue v. Lahad Datu Timber Sdn Bhd* [1978] 1 MLJ 203). If the taxpayer is successful, the tax so paid will be refunded in full. A taxpayer has an additional safeguard in that in the event a dispute on questions of law is identified it may be transmitted to the High Court by way of stated.

[25] The point needs to be emphasised that the right of appeal provided by s. 99 of the ITA is a right accorded by statute, which means the Special Commissioners had no discretion not to hear the appellant's appeal on the merits if the appellant had proceeded under s. 99 of the ITA. In contrast, judicial review is always at the discretion of the court.

[26] The appellant's contention that the matter should preferably be dealt with by way of judicial review rather than by way of an appeal to the Special Commissioners was premised on the following arguments:

(a) lack of jurisdiction committed by the respondent;

(b) the appellant had demonstrated the existence of exceptional circumstances through the respondent's clear lack of jurisdiction in issuing the impugned notices of assessment;

(c) in issuing the impugned notices of assessment, the respondent disregarded the legal position as established by the superior courts and the High Court whereby gains arising from compulsory acquisition of land are not subject to income tax.

[27] Going by the arguments, it is clear that the only grievance that the appellant had against the respondent was that his decision to issue the notices of assessment was made without jurisdiction. It was not the appellant's case that the respondent had blatantly failed to perform some statutory duty or had committed some serious breach of natural justice.

[28] In support of its argument that the respondent acted without jurisdiction, the appellant relied heavily on three cases, namely (1) the Supreme Court case of *Lower Perak (supra)*, (2) the High Court case of *Ketua Pengarah Hasil Dalam Negeri v. Penang Realty Sdn Bhd & Another Appeal* [2006] 2 CLJ 835, and (3) the High Court case of *Metacorp (supra)* all of which decided that gains arising from compensation for the compulsory acquisition of land are not subject to income tax as the gains were not income earned in the ordinary course of the taxpayer's business. It was submitted that the element of compulsion vitiates the intention to trade: *Lower Perak (supra).*

[29] The basis for learned counsel to argue that the respondent acted without jurisdiction in issuing the notices of assessment was that the gains from the compulsory acquisition of the lands were not subject to tax as they were not income earned in the appellant's ordinary course of business. In other words, the contention was that the decision of the respondent to impose tax on gains from the compulsory acquisition of the lands was illegal.

[30] So the question in the present appeal was whether the respondent was in breach of the law when he issued the impugned notices of assessment. The respondent's argument was that he was not.

[31] It was submitted that while any gain or profit from compulsory acquisition of land by the government is not taxable, in which case it would be unlawful for the respondent to impose income tax, this cannot be extended to cases where the recipients had prior knowledge of the acquisition.

[32] In support of the argument, learned counsel for the respondent relied on the decision of the High Court in *F Housing (supra)*. In that case, land belonging to the appellant company had been acquired by the government. Compensation in the sum of $1,407,139.69 was paid to the appellant company and tax was assessed on the difference between this and the purchase price of the land.

[33] The question for the High Court's determination was whether the difference between the compensation awarded and the purchase price was assessable to income tax under s. 4(a) of the Income Tax Act 1967 which provides as follows:

> **4. Classes of income on which tax is chargeable**
>
> Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of:
>
> (a) Gains or profits from a business, for whatever period of time carried on;

[34] Mohamed Azmi J (as he then was) in dismissing the appellant's appeal held, *inter alia*, as follows:

> The appellant company bought the land for development in full knowledge of the fact that the property was to be acquired by the Government, and, by taking various steps to develop the land, they were successful in convincing the Collector of Land Revenue that the undeveloped land had an immediate potential value as building land and that its market value at the relevant date of acquisition was higher than the purchase price – thereby acquiring for the company an income of $298,837 being the difference between the acquisition award and the purchase price. On these facts, I hold that the compensation should be treated as income and, therefore, taxable as gains or profits from a business within section 4(a) of the Income Tax Act 1967.

[35] The appellant however contended that the case is not applicable as the facts are different. It was pointed out that the appellant company in that case had full knowledge that the land was to be acquired, unlike the appellant in the present appeal who had no knowledge that the lands were to be acquired by the Government when they were transferred to it by the shareholders.

[36] It was further submitted that there is no evidence that the transferees of the lands knew at the time when they transferred the land to the appellant that these lands were to be acquired by the Government.

[37] The contention was that the learned High Court Judge was wrong to impute knowledge of the compulsory acquisition to the appellant as that would amount to concluding that the appellant was trading in land by acquiring the lands and waiting for them to be compulsorily acquired.

[38] To determine whether the appellant had prior knowledge of the government's intention to acquire the lands, it is necessary to look at the attendant facts prior to the compulsory acquisition of the lands.

[39] First of all, it is undisputed that the appellant is a subsidiary of Iskandar Investment Berhad ("IIB") which holds 80% shares in the appellant company. IBB (formerly known as South Johor Investment Corporation Berhad) on its part is a subsidiary of Khazanah Nasional Berhad ("Khazanah") which has 60% shareholding in IIB. Khazanah being the majority shareholder in IBB is therefore the holding or parent company of the appellant.

[40] The respondent's contention that the appellant had prior knowledge of the Government's intended acquisition of the lands is borne out by the following facts:

(i) Khazanah is the entity responsible for drafting the "Comprehensive Development Plan" ("CDP") for Wilayah Iskandar, now known as Iskandar Malaysia. The construction of the coastal highway from the city centre to Nusajaya was one of the development agendas stated in the CDP;

(ii) Based on the CDP, in July 2005, the Government tasked Khazanah to conduct a feasibility study for the development of Wilayah Iskandar.

(iii) Following that, in October 2005, based on the "Conceptual Outline Plan" that was presented by Khazanah for the development of Wilayah Iskandar, Khazanah was tasked to develop "a detailed and comprehensive Master Plan" for Wilayah Iskandar.

(iv) In March 2006, the development of Wilayah Iskandar was launched by the then Prime Minister as part of the agendas in the Ninth Malaysia Plan. The CDP that had been completed by Khazanah would be used in developing Wilayah Iskandar.

(v) One of the agendas in the CDP was to repair the connectivity between the cities through the building of roads and highways as well as upgrading the existing roads and highways. The land acquisition for the development of the coastal highway that connects Johor Bahru, Danga Bay and Nusajaya was included in this plan. The draft proposal to construct the new road from Johor Bahru to Nusajaya was also stated in the CDP. Indirectly therefore, the appellant had knowledge that the lands would be acquired for the purpose of the road construction from the city centre to Nusajaya.

(vi) On 10 October 2006, the appellant company was formed by its parent company Khazanah. This was after Wilayah Iskandar was launched. Khazanah, being the parent company of the appellant, was the party responsible for drafting the CDP.

(vii) Further, apart from IIB, the other shareholders of the appellant company are Danga Bay Holdings Sdn Bhd ("Danga Bay Holdings") and Kumpulan Prasarana Rakyat Johor Sdn Bhd ("KPRJ").

(viii) Subsequently, via a subscription agreement dated 17 January 2007 and a supplemental agreement dated 18 June 2007, the appellant acquired lands from its shareholders, which are Khazanah, IIB, Danga Bay Holdings and KPRJ. The lands were part of the capital injection into the appellant company by its shareholders.

[41] Based on the relationship between the three entities, namely the appellant company, IIB and Khazanah through their shareholdings, and the surrounding circumstances of the case, it was submitted by learned counsel for the respondent that not only did the appellant have prior knowledge that the lands would be acquired by the Government but had intended to profit from the acquisition.

[42] It was further submitted that the appellant's knowledge and intention to profit from the compulsory acquisition is apparent from its move to apply to the Johor Land and Mines Office to change the status of the lands to freehold from agricultural lands and leasehold for 99 years.

[43] We were inclined to agree with the respondent. Thus, since the appellant had prior knowledge of the intended acquisition, the income that it derived from the compulsory acquisition of the lands is deemed to be gross income under sub-s. 24(1)(a) of the ITA and is therefore taxable. Section 24(1)(a) provides as follows:

> 24(1) Where in the relevant period a debt owing to the relevant person arises in respect of:
>
> (a) Any stock in trade sold (or parted with on requisition or compulsory acquisition or in a similar manner) in or before the relevant period in the course of carrying on a business;
>
> (b) …
>
> (c) …
>
> the amount of the debt shall be treated as gross income of the relevant person from the business for the relevant period.

[44] With due respect to learned counsel for the appellant, his reliance on the Supreme Court case of *Lower Perak (supra)* is misconceived. In the first place, the appellant in that case proceeded by way of an appeal to the Special

Commissioners pursuant to s. 99 of the ITA before bringing the matter up on appeal to the High Court by way of case stated, unlike the appellant in the present case who took a different route by going straight to the High Court for a review of the respondent's decision.

[45] The facts of *Lower Perak (supra)* are also distinguishable, as can be seen from the following observations by Edgar Joseph Jr SCJ delivering the unanimous decision of the Supreme Court:

> It is manifestly clear that the dominant purpose and also the dominant motive of the taxpayer was not to make profit out of the transactions with the developer but to provide a roof over the heads of its members, and so, the resulting profit could not have been derived from a trading transaction or an adventure in the nature of trade but was an accreditation to capital not liable to tax.

[46] We rejected the appellant's contention that the learned judge was plainly wrong in imputing knowledge on the part of the appellant. In the overall scheme of things, it is clear the appellant knew that the lands would be acquired by the Government and had intended to make a profit from the acquisition. Therefore, the respondent had not acted unlawfully and without jurisdiction in issuing the notices of assessment for the years of assessment 2008, 2009 and 2013.

[47] It is the duty of the respondent to administer each and every provision of law contained in the ITA and the duty of the court to apply the law to the facts of the case. Justice Rowlatt in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64, which was referred to by the Supreme Court in *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339; [1993] 2 AMR 52 said this in his judgment:

> It simply means that in taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is presumption as to tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used.

[48] It was for all the reasons aforesaid that we dismissed the appellant's appeal with costs of RM30,000. The deposit was ordered to be refunded to the appellant.